SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VOLANTE,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No. E2022-0116CV

McAllister, J.S.C.

Return Date:
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Executive Respondents' Memorandum of Law in Opposition to Petitioners-Intervenors' Three Motions to Intervene (Motion #s 11, 12, & 13 via NYSCEF)

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Cases Cited

PRELIMINARY STATEMENT

Respondent Kathy Hochul, Governor of the State of New York[1] (the "Executive Respondent"), respectfully submits this memorandum of law opposing the three pending motions to intervene. *See* NYSCEF Nos. 325 ("Motion #11"), 339 ("Motion #12"), & 360 ("Motion #13").

The Motion #11 proposed intervenor alleges that he is a registered voter living in New York County and seeks to intervene as of right to challenge the New York State Assembly map. *See* NYSCEF No. 318. The Motion #12 proposed intervenors allege that they are candidates for Congress and the State Senate, and either seek to appear on the Democratic or Libertarian primary party ballot or as independent candidates on the general election ballot; they assert an interest in intervening to "protect their rights as candidates for Congress and New York State Senate." NYSCEF Nos. 327 & 339. The Motion #13 proposed intervenor alleges that he is a registered voter in Greene County and "potential candidate" for "congressional, State Senate, and . . . State Assembly office," NYSCEF No. 349 ¶¶ 6-7, who seeks to intervene "to invalidate the New York State Assembly map and for ancillary relief." NYSCEF No. 347 at p. 1.

Notably, another motion to intervene brought by various "New York congressional members, candidates for office, and voters," was already filed while this proceeding was pending before the Appellate Division, Fourth Department. By Order entered April 14, 2022, that Court denied the motion. *See* Affirmation of Heather L. McKay, Exhibit 1.

The instant motions should be denied on several grounds. In the Court's April 29th Order the Court indicated that "[i]t will be up to the Legislature to determine whether or not to continue the June primary for all other offices . . ." Proposed Intervenors now seek to upend this Court's Order.

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[1] The office of the Lieutenant Governor and President of the Senate is currently vacant.

This Court should deny the request. Proposed Intervenor's motions are patently untimely. Additionally, while the proposed intervenors in Motions #11 and #13 would have standing to challenge the Assembly maps, none of the three intervenors come remotely close to establishing standing to seek any other relief, including relief related to petitioning. Challenges to the independent nominating petitioning period are not yet ripe. Proposed intervenors do not satisfy the requirements for intervention as of right and/or discretion. Intervention at this late stage is also inappropriate because it is beyond the statute of limitations and barred by the doctrine of laches. Finally, the impact of moving the Assembly races will ensure further chaos for candidates across New York. The certification deadline for the June primary has now passed. Ballots are being printed, and candidates for judicial elections and party elections will be impacted because the Election Law ties the Assembly districts to election districts in a number of circumstances.

STANDARD OF REVIEW

Two provisions of New York State Civil Practice Law and Rules ("CPLR") govern intervention by third parties in a pending action or proceeding. First, CPLR § 1012(a)(2) permits intervention as of right: "[u]pon timely motion, any person shall be permitted to intervene in any action . . . when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." Second, CPLR § 1013 allows intervention in the discretion of the court:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

By their terms, "[i]ntervention pursuant to either CPLR 1012 or 1013 requires a timely motion." *Rutherford Chemicals, LLC v. Assessor of Town of Woodbury*, 115 A.D.3d 960, 961 (2d

Dept 2014). Furthermore, the same generally applicable defenses, including lack of standing, apply to intervenor claims. *See generally Kobrick v. New York State Div. of Hous. & Cmty. Renewal*, 126 A.D.3d 538, 540 (1st Dept 2015) ("Supreme Court properly found that the proposed intervenor lacked standing to intervene in this proceeding.").

ARGUMENT

A. The motions to intervene are untimely.

As a preliminary matter, the pending motions are untimely. "Consideration of any motion to intervene begins with the question of whether the motion is timely." *In re HSBC Bank U.S.A.*, 135 A.D.3d 534, 534 (1st Dept 2016). "[I]ntervention . . . will not be allowed merely to permit the intervenor to accomplish now what it could have done as of right but . . . omitted to do earlier." *Darlington v. City of Ithaca, Bd. of Zoning Appeals*, 202 A.D.2d 831, 834 (3d Dept. 1994), quoting Siegel, N.Y.Prac. § 183, at 276 (2d ed.).

All of the proposed intervenors had reason to act far sooner than they have. The original petition was filed months ago, on February 3, 2022. Furthermore, the original petition challenged only the congressional map, despite raising a procedural claim about the manner in which the Legislature enacted its redistricting plans that applied not only to the congressional but also the State Senate and Assembly maps. And Petitioners' amended petition, by adding *only* a challenge to the Senate map, made even more clear that they had no intention to challenge the Assembly map. In case there was any doubt, Petitioners included a footnote reading: "To be sure, this same procedural basis for invalidation applies equally to the state Assembly map. However, the Petitioners do not challenge that map in this lawsuit. Of course, any other elector, N.Y. Const. art. III, § 5; Unconsolidated Laws § 4221, can challenge the Assembly map if that elector chooses." *See* NYSCEF No. 33 p. 5 n. 6. And another of Petitioners' footnotes provides: "Although this failure applies equally to the state

Assembly map enacted by the Legislature, Petitioners do not challenge that map or ask for its invalidation. Therefore, the Court need not consider any procedural failures related to enactment of the 2022 state Assembly map." *Id.* at p. 5 n. 7.

At no point did Petitioners or appellate courts raise concerns about the ongoing collection of petitions in any of these elections, nor the elections for state-wide office. Indeed, state-wide elections have never been raised before this Court in this proceeding. Thus, the Motion # 11 and Motion # 13 proposed intervenors are mistaken when they claim that the Court of Appeals' decision was the triggering event that first placed them on notice that Petitioners would not adequately represent their interest in challenging the Assembly map. Rather, it has been clear for over three months—at least since February 8, 2022, when Petitioners sought leave to file the amended petition (NYSCEF No. 13)—that Petitioners had no intent to challenge the Assembly map. And then on April 21, 2022, the Appellate Division, Fourth Department, though split on other issues, unanimously ruled that no relief was appropriate with respect to the Assembly map. Yet proposed intervenors have waited until May to bring that challenge.

Meanwhile, from the time this proceeding was commenced, Motion #12 proposed intervenors have known that this proceeding could disrupt the 2022 electoral calendar, necessitate a modification of that calendar to accommodate any remedial maps that this Court would order, and possibly truncate the time period in which candidates could file petitions to obtain ballot access. However, the Motion # 12 proposed intervenors make no serious attempt to justify their late filing. The Motion #12 proposed intervenors simply allege that they are candidates for Congress and the State Senate. Their "primary concern is protecting their state constitutional and statutory rights to compete in primary elections (Messrs. Carlisle and Egriu), and to file petitions for independent nominations (all proposed intervenors)." NYSCEF No. 331 ¶ 7. This does not justify a months delayed attempt at intervention.

These interests are already being represented by the original respondents, who have voiced concerns about the ongoing election process and limited time to implement new maps throughout this entire proceeding, *see* Point D below.

B. Aside from their belated challenge to the Assembly map, the proposed intervenors lack standing to bring any other challenge.

To the extent the Motion # 11 and Motion # 13 proposed intervenors seek to challenge *only* the Assembly map based on procedural grounds, the Court of Appeals' April 27, 2022 decision affirms that, as citizens of the State, they would have standing—putting aside the untimely application. However, the proposed intervenors lack standing for any additional relief requested, including relief related to independent nominating petitions, designated petitions, or any state-wide election.

To have standing under the Election Law to raise a challenge to a petition that has been filed by a candidate seeking ballot access, a party must satisfy the statutory criteria for standing. Under Election Law § 16-102, a petition challenge may only be brought by "any aggrieved candidate, or by the chairman of any party committee or by a person who shall have filed objections[.]" The filing of objections refers to the process of filing objections with the State or a local board of elections, as appropriate. *See* Election Law 6-154. Unless a party satisfies one or more of the statutory criteria for standing, the challenge to the petition must be dismissed. *See Duck v. Manion*, 116 A.D. 3d 1103, 1104 (4th Dept 2018) (petitioners lacked standing to commence judicial proceedings to challenge designating petitions because they failed to file objections).

Here, the Fifth Prayer for Relief in Motion # 13 contains a sweeping request that this Court "adopt appropriate measures and processes with respect to Congressional, State Assembly, State Senate, and state-wide office: (i) to remediate signatures on petitions that are no longer valid under N.Y. Elec. Law § 6-138 or other state law; (ii) to allow existing candidates with invalid signatures to

obtain new signatures; [and] (iii) to allow new candidates to obtain signatures to qualify for primary elections." NYSCEF No. 349 p. 18.

The proposed intervenor's status as "a registered, eligible, and active voter in the State of New York" is insufficient to confer standing,[2] even when viewed in conjunction with his allegation that "[w]ith the redrawing of district maps for congressional, State Senate, and, as Petitioner requests, State Assembly office, Petitioner is a potential candidate for each." *Id.* at ¶ 6-7. The Motion #13 proposed intervenor does not assert any facts that he is a "potential candidate" for *any* state-wide office, yet he inexplicably includes that catch-all claim in this Prayer for Relief. Identifying oneself as a "potential candidate," with no details about what steps have been taken to campaign, collect signatures or pursue any particular office, is far too vague to confer standing and obtain the broad and intrusive relief sought. *See Kobrick*, 126 A.D.3d at 540 (holding "proposed intervenor's claimed injury—that the owner may, in the future, increase his rent or seek to demolish his building—is too speculative."). Indeed, numerous candidates for office, including state-wide office, have been campaigning for months in anticipation of a primary that is just a month and a half away. Many have successfully petitioned for a place on the June primary ballot, which has already been certified by the Board of Elections.[3]

To the extent Motion #13 proposed intervenor is asking this Court to review or invalidate any designating petitions, he does not satisfy any of the statutory criteria for standing under Election Law § 16-102. Motion #13 proposed intervenor has not been a candidate for any of the offices at issue.

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[2] The same may be said about the Motion # 11 proposed intervenor's status as a "citizen of the State of New York . . . . registered to vote in the State of New York," NYSCEF No. 318 ¶ 1, but Motion # 11 does not appear to seek relief beyond invalidation of the Assembly map.

[3] *See* https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf

Nor is he a party committee chairman or a person who has filed objections. He thus lacks standing to seek any relief with respect to designating petitions. *See Duck*, 116 A.D. 3d at 1104.

Finally, to the extent that the Motion #12 proposed intervenors seek relief related to future filings for independent nomination, they too lack standing. As this Court's May 5, 2022 Advisory Opinion notes, independent nominating petitions need not be filed until May 24-31, 2022. *See* NYSCEF No. 409 at p. 2. Thus, those petitions are not yet due, nor will they be due until *after* the new congressional map is finalized and published by May 20, 2022. *Id.* Hence, any claimed injuries regarding nominating petitions are too speculative and conjectural to confer standing.

C. Proposed intervenors' claims as to nominating petitions are not ripe.

In addition to lacking standing, the claims by Motion #12 and #13 proposed intervenors involving independent nominating petitions are also not ripe. The principle of ripeness is well established. "A determination is deemed final and binding and thereby ripe for review 'when it has its impact upon the petitioner who is thereby aggrieved.'" *Parent Tchr. Ass'n of P.S. 124M v. Bd. of Educ. of City Sch. Dist. of City of New York*, 138 A.D.2d 108, 112 (1st Dept 1988), quoting *Matter of Edmead v. McGuire*, 67 N.Y.2d 714, 716 (1986). "A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520 (1986).

The fact that independent nominating petitions are not due until after the remedial maps have been established will prevent or significantly ameliorate the proposed intervenors' claimed harm. Indeed, as this Court further explained in its Advisory Opinion, [4] "[o]nce the Congressional map has been established it will be up to the candidate to make sure he/she has the appropriate number of

[4] The Court's title, "Advisory Opinion" is itself telling as to the lack of a ripe controversy.

signatures from the appropriate number of different districts." *Id.* Any future claim that there was insufficient time to accomplish this is premature.

D. Proposed intervenors do not satisfy the requirements for intervention as of right and/or discretion.

Under the CPLR, a party may intervene as a matter of right only under specific circumstances, which are inapplicable here. *See* CPLR 1012(a). As detailed below, the representation of some of the proposed intervenors' interests by the existing parties is fully adequate, whereas the proposed intervenors would not be bound by any judgment issued in this proceeding in asserting their other stated interests. Nor should this Court permit intervention in its discretion since the addition of these parties and their extraneous claims would unduly delay the imminent and urgently awaited determinations in this special proceeding. *See* CPLR 1013.

The proposed intervenors in Motion # 11 and Motion # 13 are incorrect in assuming they will be bound by the judgment in this case and thus prevented from challenging the Assembly map in a separate action. "[W]hether [a] movant will be bound by [a] judgment within the meaning of [CPLR 1012(a)(2)] is determined by its *res judicata* effect." *Citizens Organized to Protect Env't ex rel. Brinkman v. Plan. Bd. of Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dept 2008), quoting *Vantage Petroleum, Bay Isle Oil Co. v. Board of Assessment Review of Town of Babylon*, 61 N.Y.2d 695, 698 (1984). The decision not the challenge the Assembly map in this case has no *res judicata* effect upon Wax and Greenburg because "they were not parties to th[is] proceeding, nor were they in privity with" Petitioners. *Citizens Organized to Protect Env't ex rel. Brinkman*, 50 A.D.3d at 1461.

Additionally, insofar as Motion #13 raises issues far beyond the scope of Petitioners' legal challenges, including state-wide offices, those tangential claims will likewise not be subject to *res judicata*, nor do they involve a "common question of law or fact," and thus they should not be permitted to be added and delay this proceeding. *See* CPLR 1012(a)(2) & 1013.

Turning to Motion # 12, in addition to the untimeliness discussed in Point A, and the lack of standing and ripeness as to the independent nomination claims addressed in Points B & C, the remainder of this motion should also be denied because the existing parties' representation of the proposed intervenors' interests is more than adequate. As alleged candidates impacted by the invalidation of the enacted congressional and Senate maps, the proposed intervenors make little to no attempt to explain how their interests diverge from the existing parties'. Insofar as they assert that the congressional and Senate maps were unconstitutional, those interests were represented by Petitioners. Meanwhile, their "primary concern" of "protecting their state constitutional and statutory rights to compete in primary elections," *see* NYSCEF No. 331 at ¶ 7, has been raised repeatedly by all parties throughout this matter, including the bipartisan Respondent State Board of Elections ("SBOE"), which has been communicating regularly with the Court about how to best accomplish administration of the 2022 election. *See* NYSCEF Nos. 290 (SBOE letter to court re. timeframes) & 291 (Court's resulting amended order); *see also* NYSCEF No. 409 (Advisory Opinion based on "ongoing conversations with the Board of Elections").

Finally, allowing the proposed intervenors to intervene would unduly delay the determination and prejudice substantial rights of the parties in this proceeding, which has necessarily had to proceed at a breakneck pace and cannot afford interference by third parties, particularly at this late juncture. *See* CPLR 1013. The Affidavit of Thomas Connolly at SBOE made clear the risks associated with moving the date of two major races that are already underway, not to mention redistricting two state-wide maps during that process. *See* NYSCEF No. 236. Given that a month and a half has passed since that affidavit was sworn on March 21, 2022, a hearing was already held on the redistricting maps on May 6, 2022, and the Special Master's release of the new maps is imminent, an untimely challenge to the Assembly map would unduly disrupt the remedial process already well underway.

E. Intervention is barred by the statute of limitations and doctrine of laches.

To the extent that any of the proposed intervenors seek to challenge the validity of designating petitions that have already been filed and certified, even if they had standing—which they do not—their challenge would be time-barred by the statutory deadlines for filing objections, *see* Election Law 6-154, and bringing court challenges to rulings on those objections, *see* Election Law 16-102. As indicated in the stay order issued by Justice Lindley on April 8, 2022, designating petitions were received by April 7, 2022, objections were due to SBOE by April 11, 2022, and aggrieved parties had to commence legal action by April 21, 2022. *See* McKay Affirmation, Exhibit 2.

For the same reason that their motions are untimely, proposed intervenors' challenge to the Assembly map is barred by the doctrine of laches. "Laches bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered it inequitable to permit recovery*." Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 82 (4th Dept 1980). To show prejudice, a defendant must show reliance and change of position from the delay. *Id.* The prejudice that would stem from a belated challenge to the Assembly map is clear. On May 4, 2022, SBOE certified the primary ballot for Assembly elections,[5] and those elections are scheduled to go forward on June 28. If petitioners' challenge were allowed, the Assembly map would have to be redrawn by the Special Master—who has already been tasked with the design of congressional and Senate maps—and the Assembly primary could not go forward in June. This would cause yet more delay and add to the already formidable logistical challenges faced by the State and local boards of elections. This Court should decline to permit intervention only so that proposed intervenors can assert this untimely claim.

[5] *See* https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf.

F. Intervention would cause further chaos for candidates and voters and place additional burdens on boards of elections.

Changing the Assembly districts at this late stage – something that could have been raised before this Court as far back as February – would cause an additional and unnecessary burden on the State's elections process. Not only does it risk further confusion to voters and candidates, but because the primaries for the State's one hundred and fifty Assembly districts are inexorably linked to a series of other elections, this Court should adhere to its previous determination on April 29th that it would be up to the Legislature to move any other election.

First, on May 2, 2022, the Board of Elections certified all the Assembly candidates for their primaries, leading local boards of elections to begin the process of finalizing and printing ballots. Ballots are set to be mailed to overseas voters in just four days, on May 13, 2022. Elec. Law §§ 10-108(1), 11-204(4).

Second, the Election Law requires judicial delegates to be elected from Assembly districts. Elec. Law § 6-124. Moving the Assembly primary will also necessitate moving the judicial nominating process.

Previously in this litigation, Executive Respondents strenuously objected to moving Congressional and Senate races due to the timing and impact on election administration. *See* NYSCEF 82 at p. 25-26. While those arguments were unsuccessful, the current attempt to intervene warrants renewed consideration of them under this new set of facts and circumstances. This is precisely the scenario contemplated under the *Purcell* principle. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). The United States Supreme Court has repeatedly cautioned courts against changes similar to those contemplated by the proposed intervenors. A further dramatic change to New York's election cycle at this point in time risks grave harm to candidates, voters, and elections officials.

CONCLUSION

For the reasons set forth above, Executive Respondents respectfully request that the three pending motions to intervene be denied in their entirety.

May 9, 2022

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 3,583 words.

May 9, 2022
Rochester, NY

/s/ ***Heather L. McKay***
By: Heather L. McKay
Assistant Attorney General